S.C.A. 01737

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Clarke, C.J.N.S., Pace and Matthews, JJ.A.

BETWEEN:	)	John D. Wood, for the appellant
EILEEN SAMPSON, Appellant	)	Ronald A. Meagher, for the respondents
- and ANNA McGREGOR and JOSEPH McGREGOR, Respondents	)	Appeal Heard: October 7, 1987 Judgment Delivered: November 12, 1987

THE COURT: Appeal dismissed from the decision of a judge of the county court making an order of the court the report and recommendations of a Residential Tenancies Board per reasons for judgment of Clarke, C.J.N.S., Pace and Matthews, JJ.A. concurring.

CLARKE, C.J.N.S.:

The principal issue in this appeal is whether the county court has the authority under the Residential Tenancies Act, S.N.S. 170, c. 13 to order a landlord to pay tenants, by way of rebate or repayment, the amount of rent paid by them in excess of that authorized by the provisions of the Rent Review Act, S.N.S. 1975, c. 56.

The appellant (landlord) purchased the premises at 60 Hartlen Avenue in Halifax on December 31, 1984. It was subject to the tenancy of the respondents (tenants) who had been living there since May 1982, paying a monthly rental of $ 480.00. The landlord gave the tenants a notice to quit effective April 1, 1985. The tenants did not wish to move. As a result the parties agreed the tenants would remain and the rent would be increased to $ 600.00 per month. The tenants paid this amount until the tenancy was terminated on June 30, 1986.

The landlord did not return the security deposit, with interest, as requested by the tenants. On August 28, 1986 the tenants made an application to the County Court of District Number One, under s. 10A of the Residential Tenancies Act for an order "requiring the payment of money by the landlord".

Section 10 provides in part,

> 10A (1) A landlord or tenant may, not more than one year after the termination of the tenancy, apply in the form prescribed by regulation to the county court of the district in which the premises are situated for an order
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> (a) declaring the tenancy to be terminated;
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> (b) setting aside a notice to quit;
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> (c) directing that the landlord or tenant be put into possession of the residential premises;

(d) directing the tenant to pay the rent in trust to the board and directing the board as to the disposition of the same;

(e) requiring the payment of money by the landlord or tenant;

(f) requiring the landlord or the tenant to perform any act or cease and desist from any act.

(2) Upon receipt of the application the county court clerk shall issue an order of the court referring the application to the appropriate board for a report and the clerk shall notify the board.

(3) Upon receipt of the notification from the clerk, the board shall serve the landlord and the tenant with notice of the time and place of the hearing.

The application was made in the form prescribed by the regulation. It was assigned an action number in the county court and the clerk of the court referred it to the Halifax and County West Residential Tenancies Board for a report and recommendation.

An officer of the Board suggested the tenants review the authorized rent for the premises with a residential tenancies officer of the Rent Review Commission. This was done pursuant to s. 11 (1) of the Rent Review Act. It resulted in the following decision being issued by Residential Tenancy Officer MacNeil on September 2, 1986.

> A tenant inquiry regarding authorized rent for the above cited unit was made to the Rent Review Commission, July 16, 1986.
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> The landlord was advised by letter dated July 28, 1986, of the requirements of the Rent Review Act and requested to comply with the legislation and regulation pursuant thereto.
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> The landlord was to register the unit in question and make application for the amount of rent he wished to collect.
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> To the date of this decision no application has been made nor any explanation offered as to why not.
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> According to records of the Rent Review Division the unit was authorized at an amount of rent of $265.00, effective December 1, 1978.

Without application having been made in previous calendar years, the landlord is entitled only to the annual statutory guideline increases as determined by the Governor in Council.

The approved rents are as follows:

Authorized Rent Dec./78	Jan.1/82	Jan.1/83	Jan.1/84	Jan.1/85	Jan.1/86
$265.00	$355.00	$376.00	$399.00	$419.00	$436.00

Services included in this rent at the landlord's expense are: water, range and refrigerator.

This decision was referred to the Board and joined in the application advanced by the tenants. The Board held a hearing on October 28, 1986 at which both the landlord and the tenants were present. The Board described the application as one "by the tenants seeking a return of their security deposit and for reimbursement of rental overpayments made to their landlord". By the time the hearing was convened the landlord had returned the security deposit to the tenants, but without interest. The Board heard the evidence and representations of both the landlord and the tenants.

The written report and recommendation of the Board was dated November 4, 1986. It recited the procedure that led to the matter coming before the Board and the nature of the application. It summarized the evidence of the witnesses in considerable detail. The Board noted that the landlord said she had failed to appreciate that "she had to file this with the Rent Review Commission and seek any increase above the guidelines", and that the tenants had "accepted and paid their rent for years without question". The Board made an arithmetic calculation of the difference between the rent charged the tenants by the landlord during the time they were her tenants and the statutory amount permitted by s. 9 (3) of the Rent Review Act, as determined by the residential tenancy officer of the Rent Review Commission, and reproduced above. The unpaid interest on the security deposit was also

determined. The Board concluded by saying,

> We recommend to the court that the landlord, Eileen Sampson, be ordered to pay to the tenants, Anna and Joseph McGregor, the sum of $ 115.47 in security deposit interest and $2,796.00 in rent rebate for a total amount of $2,911.47.

After the report was filed with the county court and copies were made available to the parties, the landlord filed a notice of objection with the court. While numerous grounds were advanced, the general thrust of the objection was that the Board did not have the jursidiction to hear an application for the rebate of unauthorized rent and that in so doing it acted improperly by deciding what the authorized rent should be. Other grounds included allegations that the Board had failed to consider the evidence, advanced a recommendation that was biased against the landlord and acted contrary to s. 15 (1) of the Candadian Charter of Rights and Freedoms by failing to apply the law equally to the landlord and the tenants.

The objection and the report were considered by the Honourable Judge Cacchione of the county court on December 12, 1986. He concluded that until Burke v. Arab (1982) 49 N.S.R. (2d) 181 the Residential Tenancies Board had jurisdiction, concurrent with the Rent Review Commission, to review rental charges. As a result of the decision the Board ceased to have the power of review but retained the right to recommend the repayment of excess rent to tenants. He also stated that since the monetary jurisdiction of the county court extends to $ 50,000., he had the authority to confirm the award recommended by the Board. Judge Cacchione adopted the report and recommendation of the Board in whole and made it an order of the court pursuant to s. 10 (5) of the Residential Tenancies Act.

The following three grounds were argued by the landlord in her appeal from the decision of the trial judge.

1. He erred in finding that the Residential Tenancies Board has concurrent jurisdiction with the Rent Review Commission to review and determine authorized rents and to order rebates of excessive rents because the Residential Tenancies Board exceeded its jurisdiction in hearing an application for a review of rent and rebate of unauthorized rent.

2. He erred in finding that the monetary jurisdiction of the Residential Tenancies Board is not limited, but is concurrent with that of the County Court and extends to $ 50,000.00.

3. He erred by failing to consider whether the decision of the Residential Tenancies Board was fair and equitable in circumstances where both parties failed to follow the rent review process, where the tenants accepted and paid the increased rent without question and where the landlord acted in good faith.

The First Ground

The Residential Tenancies Act, s. 11 (3) provides, in part,

> It is the function of the residential tenancies board and it shall have power,
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> ...
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> (d) to investigate and review the rent charged for residential premises and determine whether the rent be approved or varied;
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> ...
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> (i) require the repayment of money by the landlord or the tenant, said payment not to exceed one thousand dollars.

In Burke v. Arab this court found that these sub-paragraphs, among others, in sub-section (3) were ultra vires. Subsequent to Burke v. Arab, the Legislature amended the Act, beginning with s. 10A, and gave jurisdiction in these matters to the county court of the district in which the premises are situated.

Section 10A (1) sets forth a procedure whereby the county court clerk refers applications to the Residential Tenancies Board for its consideration. The Board is required to hold a hearing in a manner more fully described in the Act. Then it is to prepare a report containing its recommendations which report is returned to the county court for its consideration and disposition. At that point either the landlord or the tenant may object to the recommendations of the Board. Objections, if any, will be considered by a judge of the county court when the judge makes the final disposition.

The powers of the county court are provided in s. 10C (5).

> After a period of seven business days has expired from the date of the report and whether or not a notice of objection to the recommendations of the board has been filed, a county court judge may himself or upon the applicaton of the landlord or tenant
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> (a) set a date for a hearing and give directions respecting notice of that hearing;
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> (b) adopt the report in whole or in part;
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> (c) vary or reverse the report and any finding therein;
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> (d) require a supplemental report from the board;
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> (e) decide any question or issue referred to the board on the evidence taken before the board as disclosed by its report, with or without any additional evidence;
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> (f) make an order
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> (i) declaring the tenancy to be terminated,
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> (ii) setting aside a notice to quit,
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> (iii) directing that the landlord or tenant be put into possession of the residential premises,
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> (iv) directing the tenant to pay the rent in trust to the board and directing the board as to the disposition of the same,

(v) requiring the payment of money by the landlord or tenant,

(vi) requiring the landlord or tenant to perform any act or cease and desist from any act.

Since the Board lacks the power under s. 11 of the Residential Tenancies Act "to investigate and review the rent charged for residential premises and determine whether the rent be approved or varied" (Burke v. Arab, supra), consideration must then be given to the effect of the provisions contained in the Rent Review Act. Sections 2 and 3 describe the purpose and application of the Rent Review Act in these words,

(2) The purpose of this Act is to establish a Rent Review Commission and to authorize that Commission to review all rent increases in excess of a percentage increase per annum hereinafter specified unless such increase in excess thereof has been previously authorized by this Act.

(3) This Act applies to all residential premises as defined herein notwithstanding the terms of any tenancy agreement to the contrary.

In Halifax Developments Limited v. Rent Review Commission (1981) 49 N.S.R. (2d) 710, Jones, J.A. stated at p. 718,

The object of the legislation is simply to provide for rent control and nothing more. The primary function of the Commission is to ensure that the limits fixed by the government are properly enforced and, where necesssary, to allow additional increases if the circumstances justify such action. That the Act was not intended to interfere with existing leases any more than necessary to carry out the primary object is made clear by s. 3 (2). Section 9 of the Act provides for a maximum increase based on the calendar year.

Section 9 provides for the maximum increase a landlord is entitled to recover in a twelve month period. By s. 9 (3) the maximum statutory percentage increase in each year subsequent to 1978 is determined by the Governor in Council. If a landlord wishes an increase above the statutory percentage increase provided by s. 9 (3), he must give the tenants three months

notice (s. 12) and make an application to a residential tenancy officer of the Rent Review Commission (s. 10). The rent cannot be further increased until the residential tenancy officer has followed certain procedures more fully described in the Act and an order is issued (s. 11 and s. 16).

This court has affirmed the landlord is entitled to the maximum statutory percentage increase provided by s. 9 (3), even though no copy of the notice otherwise required by s. 12 was filed with the Commission. Reference is made to Archway Masonry Limited v. Rent Review Commission (1981) 50 N.S.R. (2d) 709, Luddington v. Rent Review Commission (1983) 55 N.S.R. (2d) 34. James Dunn and John Angle v. Rent Review Commission et al (1986) 74 N.S.R. (2d) 291 and MacDonald v. Rent Review Commission (1986) 75 N.S.R. (2d) 426.

This court also has affirmed the jurisdiction of the Rent Review Commission under the Rent Review Act to order a landlord to rebate or repay a tenant that portion of the rentals paid that exceeded the allowable maximum statutory percentage. In Luddington, supra, Cooper, J.A. stated at p. 349,

> I am, however, of the view that what the Officer and the Commission had before them here was not strictly an application to increase the rent, but also a review of the rental history of Unit Number 4 and the other units. That review disclosed that the total rent paid by the appellant over the period in question exceeded the allowable statutory increases by $314.58 only. I think that in the circumstances disclosed by the whole record before us the substantive right given under s. 9 (3) of the Act should not be defeated by the failure to give notice under s. 12 (1). Indeed, I venture to suggest that this requirement was waived by the appellant who was content to pay $30.00 per week (except for the last week of her tenancy for which she was charged $25.00) without demur until she was alerted to make her inquiry about the authorized rent on the records of the Commission.

> It is my opinion also that the Commission has jurisdiction to order re-paymentof any amount paid by the tenant in excess of the authorized rent set by the Commission plus statutory increases. This is only to say that the landlord cannot charge rental not provided for by the Act, including s. 9 (3).

The reasons in Luddington were followed in Dunn and Angle, supra, at pp. 295 and 296.

> The reasons adopted by this court in Luddington should be applied here. It follows that during this tenancy the landlord is entitled to the statutory increases provided by s. 9 (3), even though he failed to give notice under s. 12 (1). Prior to his current application, the landlord did not exercise his right under s. 10 to seek a larger rental increase beyond that authorized by the Act. He must therefore be taken to have accepted the rent fixed by the statute.
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> ...
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> It follows that the Legislature intended that the Commission have the jurisdiction in law to order a rebate to the appellants-tenants in the same way Mr. Justice Cooper decided in Luddington.

The cases to which I have referred and those to which counsel referred in their briefs and arguments are fact situations where the action of the Commission was triggered by an application for a rental increase made by a landlord under s. 10 of the Rent Review Act. However, I am satisfied that the tenant, on his own initiative, may apply to the Commission for a review of a rent increase and thus gain access to the procedure provided by the Act. Section 9 (3) provides,

> Except as provided in Section 10, for any rental period between the first day of January and the thirty-first day of December, both dates inclusive, in 1978 and each subsequent year, no landlord shall charge a tenant an amountof rent which is more than the amount determined by adding to the rent lawfully charged for the same residential premises for the last rental period immediately preceding the first day of January, for which the residential premises was rented, the percentage increase determined by the Governor in Council which percentage increase shall be determined no later than the first day of September in the previous year. (emphasis added)

As earlier noted, s. 10 of the Rent Review Act describes how a landlord may proceed to seek the authority to increase rent beyond that permitted by s. 9 (3). Section 11 (1) describes the procedure to be followed by a residential tenancy officer "in reviewing any rent increase or in making any determination under s. 10 that requires the presence before him of either the landlord or the tenant or both ...". (emphasis added) Since the landlord is prohibited from charging rent in excess of that provided by s. 9 (3), unless he applies to the Commission, the Act cannot, in my view, be interpreted as precluding the tenant from gaining access to the system to determine whether the rent he is paying is within the allowable limit. Section 11 (1) permits that by providing a procedure for a residential tenancy officer to follow when reviewing any rent increase, as a tenant might wish to have done, or when making a determination on an application advanced by a landlord for an amount in excess of the allowable limit. Such a conclusion is consistent with both the purpose and the scheme of the Act. In Dunn and Angle, supra, this court said at p. 295,

> The scheme of the Act is to vest in the Commission the authority to take into account the history of the tenancy and to correct inequities in the rate of rent which have occurred in a landlord and tenant relationship where the price to be paid for rental accommodation is otherwise fixed by legislation.

Therefore it was within the jurisdiction of the Commission's residential tenancy officer to respond to the request of the respondents (tenants) to review their rental increase to determine whether it fell within the statutory limits prescribed by s. 9 (3). The landlord was informed of the tenant inquiry on July 26, 1986 and asked to register the premises and make an appropriate application to the Commission. She failed to do so and the residential tenancy officer issued her decision on December 2, 1986.

I am unable to accept the landlord's argument that the Residential Tenancies Board was reviewing rent and determining the amount of rent. It had the unchallenged decision of the residential tenancy officer before it that showed the amounts of rent the landlord was entitled to charge the tenants by virtue of the Rent Review Act. Section 9 (3) of the Rent Review Act expressly states that this landlord shall not charge these tenants more than that amount. The Board explained in its report that it simply made a mathematical calculation from the decision of the officer of the Rent Review Commission and that formed the basis of the recommendation it returned to the judge of the county court. The excess paid by the tenants to the landlord was money to which the landlord was not entitled at law and thereby was a matter which fell within an application to the county court under s. 10A (1) (e) of the Residential Tenancies Act.

Judge Cacchione first stated the Residential Tenancies Board under s. 11 (3) (d) of the Residential Tenancies Act had concurrent jurisdiction with the Rent Review Commission with respect to reviewing rents. That, in my opinion, is not correct. However, he went on to state, and find, that as a result of Burke v. Arab the sub-paragraph is ultra vires, although it remains in the Act. A careful reading of his decision leads to the correct conclusion and that is that the Residential Tenancies Board does not have the authority to review and set rents on a reference from the county court. It does, however, have the authority in a case such as this one to act upon the decision of the residential tenancy officer made pursuant to the Rent Review Act and make a recommendation to the county court requiring the payment of money by the landlord to the tenant when that money consists of rent paid in excess of the limit prescribed by law. In the final analysis, no error was committed by the trial judge because the Board in making its recommendation did not assume a jurisdiction it did not have.

The Second Ground

Section 11 (3) (i) of the Residential Tenancies Act limited the power of the Board to require a landlord or tenant to make a payment of money not to exceed $ 1,000.00. This court in Burke v. Arab found the sub-paragraph was ultra vires. The subsequent amendments to the Act provide that applications, such as the present one, are in the county court. Therefore this application falls within the jurisdiction of that court.

The County Court Act, R.S.N.S. 1967, c. 64, as amended, provides,

> 27. Subject to the exceptions in Section 26 and except in the case of a debt or a liquidated demand in money which is under twenty dollars, a county court shall have original jurisdiction
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> (a) in all personal actions in contract where the debt, demand or damages claimed, whether on balance of account or otherwise, do not exceed fifty thousand dollars, and in all other actions where the damages claimed do not exceed fifty thousand dollars.

The rent paid by the tenants to the landlord in excess of that permitted by law was $ 2,796.00. It was a debt arising out of contract and comfortably within the monetary jurisdiction of the county ourt. The trial judge made no error in finding that he as a judge of the county court had the jurisdiction to accept the report of the Board and require the sum it recommended be paid by the landlord to the tenants as an order of the court pursuant to s. 10C (5) (f) of the Residential Tenancies Act.

The Third Ground

Prior to the tenants' inquiry of the residential tenancy officer of the Rent Review Commission, neither the landlord nor the tenants were aware of the provisions of the Rent Review Act. In its report to the county court, the Board observed,

> We view the order for the rent rebate as being somewhat unfortuante, Mrs. Sampson having proceeded in good faith and the McGregors having accepted and paid their rent for years without question.

At the time of the hearing in the county court, counsel for the landlord argued that under the circumstances it was unfair and inequitable that the landlord should be required to pay the amount of excess rent to the tenants. Since Judge Cacchione made no mention of this argument in his decision, it must be taken that he did not accept it.

The law in this province is that a landlord cannot charge rent in an amount larger than that authorized by the provisions of the Rent Review Act. The landlord in this case was found to have done so and thus exceeded the authorized limit permitted by the law. Accordingly the trial judge did not err by his failure to give effect to the argument advanced on behalf of the landlord.

Conclusion

I would dismiss the appeal with costs to the respondents to be taxed in one bill.

C.J.N.S.

Concurred in:

Pace, J.A.

Matthews, J.A.